(33)

Supreme Court of the United States

OCTOBER TERM, 1942

No. 651, and No. 738 - No. 742

DUNCAN C. McCREA,
THOMAS C. WILCOX, *et al.*,
Petitioners,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

BRIEF OPPOSING PETITIONS FOR WRITS OF CERTIORARI

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Authorities Cited:

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I

Opinions Below.

The opinions of the Supreme Court of the State of Michigan are officially reported as follows:

No. 651. People v. McCrea, 303 Mich. 213, 6 N.W. 2d 489,

No. 738—No. 742.
People v. Wilcox, 303 Mich. 287, 6 N.W. 2d 518,
People v. Way, 303 Mich. 303, 6 N.W. 2d 523,
People v. Stambaugh,
Elliott, and Landsberg, 303 Mich. 300, 6 N.W. 2d 522.

The opinion of the Supreme Court in the case of Bertha Malone, for whom a petition is about to be or has been filed is reported as

People v. Malone, 303 Mich. 297, 6 N.W. 2d 521.

II

Counter-Statement of Matters Involved.[*]

The following is deemed necessary to correct certain inaccuracies and omissions in the statements of counsel representing the respective petitioners for certiorari (Supreme Court Rule 27, par. 4).

It appears from the petitions that the information (28) which instituted the prosecution of this case was based upon a magistrate's finding of probable cause disclosed by the testimony taken by him on a statutory 'preliminary examination' in respect of criminal charges set forth in warrants that he issued as such magistrate after conducting a 'one-man grand jury' investigation of suspected offenses pursuant to the authority vested in him by the 'Michigan Code of Criminal Procedure',[1]

Act No. 175, Chap. VII, §§ 3-6, Pub. Acts 1927 (3 Comp. Laws Mich. 1929, §§ 17217-17220 [Stat. Ann. §§ 28.943-28.946]).

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record.

[1] This 'code' is merely a convenient reënactment of cognate laws thereby repealed and as such evinces no departure from Michigan's status as a common-law State.

Explaining Michigan's one-man grand jury, so-called.

For a clear understanding of the Michigan 'one-man grand jury', upon which counsel have cast so many aspersions, we deem it essential to review the procedure ordained by the legislature of that State for judicial investigations of complaints involving criminal offenses, the apprehension of accused persons, the 'preliminary examination' conducted by magistrates, and further proceedings before trial.

It is important to observe that, although the phrase recurs throughout the record, the term 'one-man grand jury' is not found in any statute, and that the magistrate who conducts the investigation possesses few of the traditional powers of the historic grand jury.

—Abolishment of traditional grand jury.

The State Constitution of 1835 (article 1, § 11) provided that no person should be held for a 'criminal offense unless on the presentment or indictment of a "grand jury",' and that the Constitution of 1850 (article 6, § 28) as well as our present fundamental law, ratified in 1909 (article 2, § 19) omitted this requirement and substituted therefor the 'right to be informed of the nature of the accusation'.[2]

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[2]

The Constitution of Michigan does not guarantee that an accused person shall have the right to a preliminary examination, though such a privilege is accorded by statute.

—Ordinary course of procedure before trial.

The Michigan statute charts a course of procedure for magistrates (in ordinary circumstances) when investigating complaints of criminal offenses, issuing warrants thereon, conducting 'preliminary examinations', and, when probable cause is shown, binding over for trial the person accused of offenses not cognizable by a justice of the peace,

> Act No. 175 ('Code of Criminal Procedure'), Chap. VI, §§ 1-5, 11-13 and 15, Pub. Acts 1927 (3 Comp. Laws Mich. 1929, §§ 17193-17197, 17203-17205, and 17207 [Stat. Ann. §§ 28.919-28.923, 28.929-28.931 and 28.933]).

This chapter of the code provides in substance that whenever any complaint shall be made to any 'magistrate',[3] that such an offense has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him (§ 2).

Upon sufficient showing of the commission of such a crime, the magistrate is authorized to issue his warrant to bring the accused before him 'to be dealt with according to law' (§ 3), and, when the accused person appears, the magistrate is required to set a date for a 'preliminary examination' to be conducted by him (§ 4).

Should it appear from the testimony taken at the examination, that the offense charged in the warrant has been committed and that 'there is probable cause to be-

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[3]

Such magistrates include the several circuit judges.—Act No. 175, Chap. IV, § 1, Pub. Acts 1927 (3 Comp. Laws Mich. 1929, § 17135 [Stat. Ann. § 28.860]).

lieve the prisoner guilty thereof' (§ 5), 'said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial' (§ 13). The magistrate is required to make a prompt return of his findings to the trial court (§ 15), accompanied by a transcript of the testimony taken at the examination (§ 11).

Under the decisions of the supreme court of the State, the magistrate's finding of probable cause to hold to trial, is not conclusive and, upon the respondent's motion to quash the information, and on review of the transcript of the testimony taken during the preliminary examination, the trial court is authorized and required to reverse the order of the magistrate and discharge the prisoner.[4]

Such sections of Chapter VI of the Michigan code of criminal procedure as are pertinent to the matters involved, appear in **Appendix 'B'**, *post*, p. 39.

—'Special Grand Juries'

While the State Constitution of 1850 (article 6, § 28) abandoned the traditional grand jury system, and the present Constitution failed to revive it (article 2, § 19), and although Chapter VII, § 7, of the 1927 code of criminal procedure reënacted a statute forbidding the drawing of such grand juries (Act No. 138, Pub. Acts 1859), this chapter expressly authorizes the calling of special

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[4]

People v. Rice, 206 Mich. 644,
People v. McDonald, 233 Mich. 98
People v. Licavoli, 256 Mich. 229,
People v. Hallas, 257 Mich. 127,
People v. Hirschfield, 271 Mich. 20,
People v. Wilkin & Walsh, 276 Mich. 679, 688.

grand juries composed of 16 members, whenever 'the judge (of any court) shall so direct in writing under his hand' (§ 7), and it retains for this purpose certain vestigial provisions governing their organization and proceedings (§§ 8-19).[5]

—Magisterial investigation of suspected offenses.

That part of Chapter VII which authorized the investigation conducted by the circuit judge in this cause (§§ 3-6) was a reënactment of a statute (Act No. 196, Pub. Acts 1917 as amended) enlarging the powers of magistrates to investigate complaints and issue warrants, and it adopts the framework of Chapter VI, §§ 2-4, of the code heretofore referred to.

The key that opens the door to the exertion of such judicial power is found in section three (3) of the chapter:

> "**Sec. 3.** Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to

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[5] This accounts in part at least for several anachronisms in the chapter.

attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings" (3 Comp. Laws Mich. 1929, § 17217 [Stat. Ann. § 28.943]).

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, 'he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge *shall proceed with the case . . . . in like manner as upon formal complaint'*. Also, if so satisfied, he shall report the matter to the proper officials to the end that any public officer so accused may be removed from office. So far as secrecy is concerned those participating in the inquiry 'shall be governed by the provisions of law relative to grand juries' (§ 4).

Section six (6) of this chapter provides protection under the state constitutional mandate that 'no person shall be compelled in any criminal case to be a witness against himself' (article 2, § 16):

"**Sec. 6.** No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such

questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him'' (3 Comp. Laws Mich. 1929, § 17220 [Stat. Ann. § 28.946]).

Such sections of Chapter VII, supra, as are considered pertinent to the matters involved, appear in **Appendix 'C'**, *post*, p. 44.

No. 651. Duncan C. McCrea.

We correct the following inaccuracies and omissions in the statement of this petitioner.[6]

It may be observed that the court below held 'there was ample testimony from which the jury could reasonably find McCrea guilty, beyond a reasonable doubt, of the conspiracy as charged' (2077-2089, 2089), that they were satisfied 'the testimony discussed above (2077-2093), if believed, clearly established a single conspiracy' (2093), and that they expressly referred (2097) to their comment in a companion case, People v. Stambaugh, 303 Mich. 300, 302, 6 N.W. 2d 522, 533, that

> ''the convictions should be affirmed for the reason that in the instant prosecution the testimony is so overwhelmingly conclusive of the guilt of the respec-

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[6] Much that is said in this subdivision of the brief applies with equal force to the other petitioners.

tive appellants that reversal on the ground under consideration would be a travesty on justice".

First ('Point 1'): On page two [2] of the petition it is alleged that

> "the petitioner (Point 1) was not permitted on cross-examination to lay a foundation for impeachment of witnesses, including defendants who had been granted immunity, by asking them whether they had testified differently before the one-man grand jury".

We add, as observed by the court below (2096-2097), that the Michigan code of criminal procedure (Chapter VII, § 19) makes ample provision for such impeachment by permitting the magistrate or the stenographer to be called as a witness for the purpose of testifying whether the testimony of a witness examined by him is inconsistent with, or different from the evidence given by such witness before the trial court.[7]

The record also discloses that the attention of the respondents was directed to this privilege (343), and that they neglected to exercise it (361-362).

Second ('Point 2'): On page two [2], petitioner broadly asserts that he

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[7]

Chapter VII, § 4, of the code by reference applies the following to a magistrate who investigates suspected offenses under §§ 3-6 thereof:

"Sec. 19. Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such a jury is consistent with, or different from the evidence given by such witness before such court".

> "*was forced* by the one-man grand jury to claim his State privilege against self-incrimination (State Constitution, article 2, § 16) in refusing to testify as to certain incidents which would be developed at the trial, but was penalized for claiming the privilege when the government attorney was permitted to show to the petit jury that petitioner had stood on his constitutional rights and refused to answer".

The record does not support the statement that petitioner '*was forced*' to claim his privilege, unless this Court is inclined to accept his naked testimony that he made such answers 'at the judge's insistence and for that reason only' (1707), for it appears that after this testimony was given, and probably reiterated, the special prosecutor tendered to McCrea the entire grand jury testimony, challenging him to point out wherein he had been '*forced*' to take the position he did before the 'one-man grand jury' (1740-1742), and that he refused or neglected to take advantage of the privilege (1810-1811).[8]

Third ('Point 3'): Petitioner alleges (p. 2) that he

> "was seriously prejudiced by the government in that the prosecution failed to indorse the names of *res gestae* witnesses on the information at the time of filing, although the state statute made this mandatory".

The statute to which reference is had permits addi-

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[8]

We will contend, of course, that it would require far more than this evidence to establish the fact that the magistrate 'forced' a witness to claim his constitutional privilege and thereby falsify his testimony.

tional names to be endorsed on the information by leave of court.[9]

On the 20th day of February, 1941, after the trial had been in progress over one week, petitioner filed a written motion to quash the information (73-74) for failure to indorse the names of witnesses then named for the first time. He claimed, without supporting affidavits, that the names were known to the prosecuting attorney when he filed the information. When the court heard this motion and expressed a desire to have such parties added to the information as might be *res gestae* witnesses, the prosecution raised no objection to the indorsement of any of the witnesses named in the motion, and counsel for the other defendants consented thereto, but petitioner insisted that the information be quashed, and thereupon the names were indorsed (413-415). Petitioner claimed no surprise, and requested no adjournment; rather he chose to stand on his technical 'rights'.

Fourth ('Point 4'): Petitioner next alleges that he was compelled to proceed with a jury which was illegally drawn from a list of jurors of registered voters, but excluded electors who were not registered voters, but who had the qualifications of jurors, although the State statute in no way contemplated the exclusion of electors who were not registered voters.

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[9]

The statute provides:

"Sec. 40. All informations shall be filed . . . . by the prosecuting attorney of the county as informant; he shall . . . . indorse thereon the names of the witnesses *known to him at the time of filing the same. Names of other witnesses may be endorsed before or during the trial by leave of the court and upon such conditions as the court shall determine*". Act No. 175, Chap. VII, § 40, Pub. Acts 1927 (3 Comp. Laws 1929, § 17254 [Stat. Ann. § 28.980]).

Petitioner, it should be observed, filed a written challenge to the array when the jury box was first filled (75), the basis of which was that the list of jurors furnished for the trial was not taken from all the qualified electors of Wayne county, in that the names were selected from a list of registered voters, thereby excluding unregistered voters who had the qualifications of jurors; it being claimed that this exclusion was arbitrarily made.

The affidavit attached to this motion (78-80) states that McCrea had been the legal advisor for the Wayne county board of jury commissioners for upwards of six [6] years, 'and is familiar with their methods and procedure for selecting jurors and of the facts herein stated'.

No further showing, either by oral testimony or affidavit, was made, and the affidavit which accompanied the motion alleged no facts. Just before the jury was sworn, the trial judge denied the challenge. Meanwhile, jury panels from A to E had been exhausted and an additional panel had been furnished from which the jury had been drawn, and all parties save McCrea had announced themselves as satisfied (77).

Further action was not taken until petitioner had been adjudged guilty by the jury and sentenced (1987). On that day he had filed a motion for new trial and subsequently, on May 20, 1941, he filed a supplemental motion for new trial and amendments to his motion challenging the array (2029). An amendment to this supplemental motion was filed by him on June 14, 1941 (2035), both of which were denied (2041). He then filed a second supplemental motion (2042), which was denied (2047); and then filed a third supplemental motion (2048) which was likewise denied (2050).

Fifth ('Point 5'): It is alleged that petitioner 'was seriously prejudiced in that the jury, in its deliberation, was permitted to have in the jury room three volumes of the transcript of testimony without the knowledge of the court or defense counsel and certain exhibits with the approval of the court but without the knowledge or consent of defense counsel' (p. 3).

The record shows that while the jury was deliberating an officer of the court, without instructions from the trial judge, committed the blunder of handing three volumes of the unauthenticated transcript of the testimony to the foreman of the jury. Between five [5] and ten [10] minutes later these volumes were retrieved and the officer was reprimanded by the court (1900-1903, 1915, 1916).

Thereupon certain testimony was taken from the court reporters to show the authenticity of the transcript which had been in possession of the jury for a few minutes (1892-1896). This was in the presence of the jury (1895).

Sixth ('Point 6'): The final contention is that petitioner

> "was named a defendant in four warrants . . . wherein the one-man grand jury was the complaining witness, prosecuted on the second of these warrants, brought before the same one-man grand jury sitting as a preliminary hearing magistrate, and probable cause found notwithstanding that the one-man grand jury had prejudged the question of probable cause when he filed the warrant as complaining witness".

The foregoing statement has few shreds of truth supported by the record, and it is quite evident that peti-

tioner, who is well acquainted with Michigan criminal procedure, has deliberately misled his own counsel into error.

The magistrate issued the warrants after due investigation under statutory authority, not as a 'complaining witness', and, as the Supreme Court correctly observed,

> "the record contains no affidavit substantiating McCrea's charge of prejudice and bias on the part of the examining magistrate. Our attention has not been called to any act or conduct on the part of Judge Ferguson, while conducting the preliminary examination, from which prejudice or bias could be inferred" (2099).

It is our position that the Michigan code of criminal procedure expressly authorizes an investigation magistrate to conduct the preliminary examination,

> Act No. 175, Chap. VII, §§ 3-6, Pub. Acts 1927 (3 Comp. Laws 1929, §§ 17217-17220 [Stat. Ann. §§ 28.943-28.946]).

Moreover, petitioner failed to include in the record, or produce, the transcript of the testimony taken before the examining magistrate, and he thus deprived himself of the right to judicial review thereof on motion to quash the information on the ground of lack of probable cause (2097-2098).

No. ——. Bertha Malone.

The clerk of the Court informs us that Bertha Malone, one of the defendants convicted of conspiracy in this

cause, intends to file (unless she has already done so) a petition for certiorari.

In the court below, this respondent was represented by the same counsel who appeared for Thomas C. Wilcox et al. (No. 738–No. 742), and in deciding her case on appeal the Supreme Court said:

> "She is before the court on the same record as the other defendants and she joins in the brief of defendants Wilcox, Elliott, Lansberg and others. As she does not raise any questions not considered in the opinion rendered herewith in the cases of Wilcox, Elliott and Lansberg, those decisions control our determination in the instant case".
>
> *People v. Malone,* 303 Mich. 297, 6 N.W. 2d 521.

Since what we have to say concerning No. 738–No. 742, would undoubtedly apply with equal force to her case, we are willing to waive the filing of a separate brief in the case of Malone, to avoid further delay.

No. 738—No. 742. Thomas C. Wilcox et al.

Since these petitioners raise questions similar to those involved in No. 651 (Points 1, 4, 5, and 6), we follow the order of the McCrea petition in correcting inaccuracies and omissions in their joint statements.

First (McCrea's 'Point 1'—Wilcox 'Question 7'): The point that petitioners were limited in their cross-examination of witnesses by denial of use of the 'grand jury' testimony for purposes of impeachment is first mentioned in their summary of claims for the writ (p. 11),

unsupported by record page citation, and is not referred to elsewhere in the petition. Nor is it mentioned in the statement of facts found in their brief (pp. 14-15).

It should be observed, in this connection, that during the trial counsel who represented these petitioners stated that he might want to call Judge Ferguson (the magistrate who conducted the 'one-man grand jury' investigation) 'as a witness here' and was informed he had that privilege (343).

Second (McCrea's 'Point 4',—Wilcox 'Question 1'): The present claim that the jury which decided petitioners' case 'was illegally drawn' in violation of the laws of the State of Michigan, was first raised below on a supplemental motion for new trial (2013-2017), without testimony or supporting affidavits.

Petitioners mention no challenge to the array prior to trial or at the time the jury was empanelled, and the record fails to disclose such a procedure.

Third (McCrea's 'Point 5'—Wilcox 'Question 2'): Counsel for petitioners, as did counsel for McCrea, complains of the incident which occurred after the jury had started their deliberations, but he barely mentions it in his petition and few details are supplied. Record citations are absent, with one exception (1890).

Fourth (McCrea's 'Point 6', Wilcox 'Question 3'): It is claimed that the magistrate who conducted the 'one-man grand jury' investigation was incompetent to conduct the preliminary examination, and the question appears to have been raised on a motion to quash (59-60). Error is also based on the further contention that peti-

tioners were not given opportunity to examine the witnesses at such examination (612), but these are the only record page citations. As in the case of McCrea, the transcript of the testimony taken at the examination is not printed in the record.

Fifth (Wilcox 'Question 4'): Counsel avers in the petition that 'your petitioners were not permitted to be confronted by the witnesses against them', but he cites no record page. Such record pages as are cited in the brief (88, 89, 105) afford only a hazy idea as to what occurred.

Sixth (Wilcox 'Question 5'): The inconsistent claim is made that petitioners were not permitted to waive the preliminary examination, but again, as in the question that Judge Ferguson was disqualified to act as examining magistrate, there is no record of such proceedings. And petitioners cite the wrong statute,

> *Compare* Act No. 175, Chap. VII, § 42, Pub. Acts 1927 (3 Comp. Laws 1929, § 17256 [Stat. Ann. § 28.982]), cited by petitioners, and § 1 of Chapter VI of the same act (3 Comp. Laws 1929, § 17193 [Stat. Ann. § 28.919]).

Seventh (Wilcox 'Question 6'): It is said that petitioners were forced to permit testimony against them of similar offenses by parties who were not named in the conspiracy (information) either as defendants or co-conspirators, but, as in other instances, there are insufficient record page citations (274, 275, 305) to apprise the court of the effect of such testimony upon these particular petitioners.

III

Basis of Jurisdiction.

We take the position there are no valid bases for jurisdiction in any of these cases and, with this in view, we correct certain inaccuracies and omissions in the statements of the other parties.

No. 651. Duncan C. McCrea.

1st ('Point 1'): It is said 'petitioner objected to the limitation of cross-examination (242, 361-362, 479) as being a deprivation of Federal due process, error was assigned on this ground (10), and that the Supreme Court of Michigan considered the Federal question (2093) and overruled it' (Petition, p. 4).

While the court below held McCrea 'was not denied due process' (2097), this dictum was not essential to their decision which was controlled mainly by local considerations (2093-2097). Moreover, it cannot be said that in the trial court petitioner clearly objected on Federal grounds to the alleged limitation on cross-examination (242, 338, 349, 361, 362, 363, 364, 479, 482, 955, 973, 1329, 1330), and his motion for mistrial does not appear to have been made on the theory that such a limitation deprived him of due process, nor did he raise this Federal question on motion for new trial (2029, 2035, 2042, 2048) or by assignments of error (10, 11).

2nd ('Point 2'): Counsel is mistaken in saying that petitioner asserted that 'requiring him to answer denied him Federal due process (1698)', that he asked for a mistrial (1702, 1738-1740), moved to strike (1808), and

assigned error (3, 12, 13) *'all on the Federal ground'* (Petition, p. 4).

While counsel who represented petitioner during the latter's cross-examination, referred rather vaguely to the Constitution of the United States (1698), he never 'specially set up or claimed . . any title, right, privilege or immunity . . under the Constitution' (Judicial Code, § 237 as amended [28 FCA § 344, 28 USCA §344]) when he objected (1698) or when he moved for a mistrial (1738-1740). On the occasion of his motion to strike the testimony (1808-1810), petitioner relied solely on the Fifth Amendment (1808) and article 2, § 16, of the State Constitution (1809), but he made no special claim that he was being denied Federal due process. And he assigned no error on this specific ground (3, 12, 13).

3rd ('Point 3'): Although petitioner objected to the failure of the prosecutor to indorse the names of certain *res gestae* witnesses, and moved to quash the information on that ground (73, 93), he did not specially set up or claim any 'right, privilege or immunity . . under the Constitution', nor did he assign specific error on that theory (3).

4th ('Point 4'): While in his challenge to the array of jurors (79) petitioner claimed a denial of Federal due process, and raised the point in his supplemental motion for new trial (2032), and although the Supreme Court held he had not been denied this privilege (2129), the question was decided on other controlling grounds, specifically, that petitioner had failed to make a sufficient showing that the jury panel had been drawn contrary to Michigan law, and that his challenge to the array on

supplemental motion for new trial, came too late under established state practice (2127-2131).

5th ('Point 5'): In stating the 'basis of jurisdiction' to consider the question involving the three volumes of testimony, and certain exhibits, sent to the jury for their consideration (1900, 1906, 1907, 2111-2119), counsel fails to assert that petitioner moved for a mistrial (1906) or raised any objection on the ground that he was being denied any rights under the Fourteenth Amendment. As a matter of fact, no such objections were made and no error was assigned on Federal grounds (9). This was purely a local question.

6th ('Point 6'): In his motion to quash the information (68), because the examining magistrate was disqualified (69-73), petitioner did claim that he had been denied the equal protection of the law and due process of law under the 14th Amendment. But in the Supreme Court this question was decided on the ground the magistrate was expressly authorized by local law to conduct such an examination, and that petitioner had failed to establish prejudice. The decision was not controlled by the dictum that '*furthermore*, the law is well settled that the due process clauses of the Federal and State Constitutions do not require a preliminary examination in criminal proceedings (citing authorities)'.

No. 738—No. 742. Thomas C. Wilcox et al.

It may be said, in general, that none of these petitioners raised these Federal questions in the trial court.

First (McCrea 'Point 1',—Wilcox 'Question 7'): The present claim that petitioners were unduly limited in their cross-examination of witnesses, because they were

barred from using the transcript of grand jury testimony for purposes of impeachment, is not raised in their 'Statement of Jurisdiction' nor does it appear in the 'Statement of Facts'. No special claim of Federal rights, privileges or immunities was made when the question arose in the trial court (242, 361-364, 479), and no error was assigned on that ground (13-17).

Second (McCrea's 'Point 4',—Wilcox 'Question 1'): When petitioners, for the first time, challenged the array of jurors in a supplemental motion for new trial (2013-2017), they claimed a denial of Federal due process and equal protection, but the Supreme Court, by adoption of their opinion in the case of McCrea (2169, 2181, 2189, 2196, 2203), decided this question on the controlling ground that petitioners had failed to make sufficient showing that the jury panel had been illegally drawn, and that the challenge to the array came too late on supplemental motions for new trial, under an established state practice (2127-2131).

Third (McCrea's 'Point 5',—Wilcox 'Question 2'): Counsel cites one page of the record (1890) in support of his contention that error supervened when the court officer committed a blunder in handing to the jury certain volumes of the testimony. It does not appear therefrom that any Federal constitutional question was raised at any point of the procedure, and petitioners did not assign error on the ground of denial of due process (13-17).

Fourth (McCrea's 'Point 6',—Wilcox 'Question 3'): In petitioners' motion to quash (59) it is said that 'the examining magistrate forced this defendant into the examination of this cause in violation of his constitutional rights', but the 14th Amendment is not mentioned, and no error is assigned on Federal grounds (13-17).

Fifth (Wilcox 'Question 4'): Petitioners now claim that, in the testimony of William Dowling (88, 89, 105), they were not permitted to be confronted by certain witnesses, but the record (88, 89, 105) discloses that petitioners' objection to such testimony was based on the sole ground that it was irrelevant (88, 89) and possessed no probative value (105). The Federal question was not raised in the assignments of error (13-17).

Sixth (Wilcox 'Question 5'): While the present claim that these petitioners were not permitted to waive preliminary examination was raised on motions to quash (59-63) based on the ground that this was 'in violation of his constitutional rights' (59), no error is assigned on that theory (13-17), and the decision of the Supreme Court (2174) rests entirely on the provisions of a local statute giving the State, as well as respondents to a criminal accusation, the right to an examination (Chapter VI, § 1, Code of Criminal Procedure, *ante*).

Seventh (Wilcox 'Question 6'): Petitioners' objections to the admission of testimony (274, 275, 305) which they now contend permitted consideration of other offenses by parties who were not named in the conspiracy, were based solely on the ground of irrelevancy, nor was error assigned on the ground that such testimony violated any right or privilege guaranteed by the Federal Constitution (13-17).

IV

ARGUMENT

Introduction

This criminal case, as we view it, is one of many where a state supreme court after careful review finds 'overwhelming' evidence of guilt and concludes there is no reversible error. It is an instance in which claims of constitutional infringement are exaggerated out of all proportion to incidents that did not permeate the trial.

Since a strong presumption of fairness and impartiality accompanies a sovereign State to the threshold of this Court, and since petitioners have been convicted of flagrant violations of the public's trust in the administration of their high offices, they should not be granted certiorari on the basis of merely technical claims involving the Constitution of the United States, or in absence of a clear showing that their fundamental rights have been violated.

While on occasion defense counsel referred somewhat vaguely to 'constitutional rights' and in a few instances expressly invoked the Fourteenth Amendment, with these exceptions they did not 'specially set up or claim . . . any title, right, privilege or immunity . . under the Constitution' (Judicial Code, § 237 [28 FCA, USCA § 344]).

Furthermore, the majority if not all of the questions now presented in a constitutional aspect were decided by the court below as domestic issues largely controlled by state statutes the validity of which is not challenged.

The rule is well-established that, unless errors result

in injustice, or in the deprivation of life or liberty by a denial of fundamental and essential rights,

Clyatt v. United States, 197 U. S. 207,
Weems v. United States, 217 U. S. 349,
Kansas City Ry. Co. v. Guardian Trust Co., 240 U. S. 166,
United States v. Atkinson, 297 U. S. 157,

or the rights involved are such that 'neither liberty nor justice would exist if they were sacrificed',

Palko v. Connecticut, 302 U. S. 319,

this Court will consider only such questions as were raised and reserved in the lower courts,

3 Am. Juris., Appeal and Error, § 246,
Miller v. Texas, 153 U. S. 535,
Young v. Masci, 289 U. S. 253.

Nor will this Court reverse a decision of the highest court of any State or a federal court unless it clearly appears that substantial rights have been violated,

United States v. River Rouge Improvement Co., 269 U. S. 411,
McCandless v. United States, 298 U. S. 342,

that 'some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental' has been offended,

Powell v. Alabama, 287 U. S. 45, 67,
Snyder v. Massachusetts, 291 U. S. 97,

or that there has been a 'failure to observe that fundamental fairness essential to the very concept of justice',

Lisenba v. California, 314 U. S. 219,

or, as said in an earlier case, the Fourteenth Amendment is applicable only when there has been an 'arbitrary' deprivation of life, liberty, or property,

Ex Parte Converse, 137 U. S. 624.

"The phrase 'due process of law' does not mean that the operations of the state government shall be conducted without error or fault in any particular case or that the federal courts may substitute their judgment for that of the state or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases",

14 Am. Juris., Criminal Law, § 122, citing
Frank v. Mangum, 237 U. S. 309.

And it requires little support of authority to establish the well-known principle that this court will acquiesce in the construction given by state courts to state enactments or Constitutions,

11 Am. Juris., Constitutional Law, §§ 107, 109,
Tullis v. Lake Erie & Western R. Co., 175 U. S. 348,
Hawks v. Hamill, 288 U. S. 52,
Morehead v. New York, 298 U. S. 587.

Having in mind these general principles, we now consider briefly the questions raised by petitioners.

Point One

[McCrea, 'Point 1',—Wilcox, 'Question 7']

Petitioners' contention that cross-examination was unduly limited, was overruled by the court below on the basis of a state statute which is unchallenged here, and their objections in the trial court were not predicated on Federal grounds.

It suffices to say, without repeating our statements concerning the matters involved and the basis of jurisdiction, that in disposing of petitioners' claim that the privilege of cross-examination had been unduly limited by a denial of the use of the 'grand jury' testimony for purposes of impeachment, the Supreme Court rested their decision upon a local law which provided a fair means for such impeachment, and that petitioners neglected to take advantage of the opportunity thus afforded (343). They might have called as a witness the stenographer who transcribed his notes of the 'grand jury' testimony, or the magistrate himself, but they did not do so. Moreover, as heretofore observed, petitioners' objections were not predicated on any claim of right or privilege guaranteed by the Constitution of the United States.

Point Two

[McCrea 'Point Two']

Disclosure before the petit jury of petitioner's claim of privilege before the investigating magistrate, violated no right guaranteed by the Fourteenth Amendment—and the question was not specially raised in its present aspect.

That petitioner made no special claim of violation of constitutional rights guaranteed by the Fourteenth Amendment, in respect of this matter, appears from our statement concerning the basis of jurisdiction, and this need not be repeated.

First: Article 2, § 16, of the Michigan Constitution provides that 'no person shall be compelled in any criminal case to be a witness against himself', but this privilege is not guaranteed by the Fifth Amendment to the Constitution of the United States.

> "Immunity from self-incrimination in the courts of the states is not secured by any part of the Federal Constitution—not by the Fifth Amendment, because it is restrictive of Federal action only, and not by the Fourteenth Amendment, because immunity from compulsory self-incrimination was not a part of the 'law of the land' at the time the American colonies became independent of England. Furthermore, it is not one of the fundamental rights, privileges and immunities of citizens of the United States or an element of due process of law within the meaning of the constitutional provisions",
>
> 14 Am. Juris., Criminal Law, § 146,
> *Twining v. New Jersey*, 211 U. S. 78,

Ensign v. Pennsylvania, 227 U. S. 592,
Snyder v. Massachusetts, 291 U. S. 97,
Palko v. Connecticut, 302 U. S. 319,
Cf. *Lisenba v. California,* 314 U. S. 219.

The late Mr. Justice Cardozo, speaking for the Court in the case of *Palko, supra* (p. 325), said:

> "What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining v. New Jersey, supra.* This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry. The exclusion of these immunities and privileges from the immunities and privileges protected against the action of the states has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications of liberty itself".

The rule is also well-recognized that a defendant in a criminal case who voluntarily testifies in his own behalf, as did this petitioner, waives completely his privilege under the Fifth Amendment, and, by the same token his privilege against self-incrimination under State Constitutions,

Sawyer v. United States, 202 U. S. 150,
Powers v. United States, 223 U. S. 303,

Caminetti v. United States, 242 U. S. 470,
Raffel v. United States, 271 U. S. 494.

And this Court has held that a violation of defendant's rights under a provision in a State Constitution which is identical to one in the Federal Constitution which is only obligatory on the Federal courts, does not infringe a Federal right,

Ensign v. Pennsylvania, 227 U. S. 592.

Second: When petitioner, who was prosecuting attorney of his county, was called to respond to an orderly inquiry, 'justice did not perish', and when placed on trial he chose to take the stand in his own behalf, thus subjecting himself to an orderly cross-examination to test his credibility, all privileges against 'self-incrimination' was thereby waived.

On direct-examination, McCrea testified he had discussed handbooks and other forms of gambling with one Colburn, his chief investigator (1697).

On cross-examination (1711), he was asked:

"Q. Did you ever discuss policy and mutuel games with Harry Colburn?

A. If I did, it was a legitimate discussion.

Q. You are sure of that?

A. Yes, sir, very sure.

Q. So there was nothing illegitimate about any discussions you had with Harry Colburn with reference to policy or mutuel games?

A. That is correct".

The prosecutor then proceeded to test the witness'

credibility by directing attention to the fact that when the same question was propounded during the judicial inquiry before Judge Ferguson, McCrea refused to testify on the ground that his testimony might tend to incriminate him (1711-1712).

This, we submit, was a legitimate line of cross-examination. It is quite apparent from the record that the answers which McCrea gave before the trial court would not have incriminated him had he testified to the same effect before the court of inquiry; and it became very important as bearing upon his credibility to determine why he stood upon his constitutional rights before the 'grand jury', inasmuch as the position taken there was definitely contrary to the position taken and the testimony given before the trial jury.

This was well-stated by the trial court in denying a motion to strike McCrea's cross-examination (1811-1812), and by the Supreme Court in refusing to reverse on this ground (2133).

It is inconceivable that a member of the bar, while under oath before the 'grand jury', should refuse to answer because his testimony, if given, might tend to incriminate him, unless it would. Either he falsified before the 'grand jury' or he falsified in his testimony upon the trial. Moreover, he was given ample opportunity to explain how it happened that he gave these answers before the 'grand jury', and his position was fully presented to the jury for their consideration in determining his credibility (1705-1717).

When petitioner claimed he was *'forced'* to claim his privilege, he was tendered the grand jury testimony and

given permission to examine his entire testimony for the purpose of pointing out in what manner the magistrate had *'forced'* him so to do, but he refused to exercise this privilege or avail himself of the opportunity (1740-1742, 1810).

We respectfully submit that, so far as this incident is concerned, there is no evidence that the State of Michigan has denied petitioner any fundamental right guaranteed by the Fourteenth Amendment.

Point Three

[McCrea, 'Point 3']

Failure before trial to indorse on the information the names of certain res gesta witnesses denied no constitutional rights 'specially set up or claimed'.

This point is fully covered in our statements *ante*, to which reference is prayed.

The question was presented to (3) and decided by (2119-2127) the Supreme Court of Michigan as a purely local issue controlled by a state statute, and no Federal question was raised (3, 73, 79).

Point Four

[McCrea, 'Point 4',—Wilcox, 'Question 1']

No Federal privileges or rights were violated in the drawing of the jury panel, and the question was decided on local grounds.

This point is also fully covered in our statements, and it is unnecessary to repeat what was said there.

Suffice it to observe that while the Supreme Court held petitioners had not been denied due process (2129), this was not essential to their decision that McCrea failed to prove that the jury panel had been illegally drawn, and that petitioners' challenge to the array on motion for new trial came too late under established local practice (2127-2131).

Point Five

[McCrea, 'Point 5',—Wilcox, 'Question 2']

No Federal constitutional rights were violated when without judicial knowledge or consent three volumes of testestimony were sent to the jury room, and no Federal question was raised in the court below.

The circumstances in which three volumes of the testimony found their way to the jury room and there remained for no more than ten minutes, are narrated in our statements concerning the matters involved and the basis of jurisdiction. It clearly appears therefrom that counsel for the defendants offered no objection and made no motion for a declaration of mistrial on the ground that their constitutional rights were in jeopardy, nor did they assign error for the purpose of raising such a federal question. We submit the matter should not be considered here. Moreover, it is apparent that no prejudicial error was committed, and the high court so held (2111-2119).

Point Six

[McCrea, 'Point 6',—Wilcox, 'Question 3']

The fact that the preliminary examination was conducted by the magistrate who, upon investigating suspected offenses, issued warrants, violated no Federal constitutional rights.

As heretofore observed in our statement of matters involved, the Michigan code of criminal procedure expressly authorizes any circuit judge to act as a magistrate in the investigation of criminal offenses, and, upon finding of probable cause to suspect the commission of such crimes, to issue his warrant and proceed to examination. The record shows that such an orderly procedure was followed in this case.

Counsel for the petitioner McCrea injects into this question the following accusation:

> "An inquisition was conducted wherein witnesses were interviewed in a star-chamber room in a local office building (478-9); subpoenas were served without regard to law (341-7) and on many occasions witnesses were apprehended without subpoena (1745); witnesses were held incommunicado for days (1123, 4-30); third degree methods were used (478-9); other atrocities occurred (1219-20). After thus securing 'evidence', the indictment was returned" (Brief, p. 14).

Testimony concerning such extra-judicial proceedings, none of which are directly attributable to the magistrate who conducted the inquiry, was brought out by defense counsel in cross-examining the State's witnesses and to

test their credibility. None of these facts were relied upon as the basis for a claim that the constitutional rights of the respondents had been violated. The State introduced in evidence no confessions, and there is no claim in this record that any of the defendants, or any witness, was forced, by third degree methods, to confess or to testify.

A petitioner cannot ask redress 'for any disregard of due process prior to his trial', *Lisenba v. California, supra*, and there is no suggestion that the treatment of 'grand jury witnesses' was reflected in the trial.

Moreover, as observed by the Supreme Court,

> "the record contains no affidavit substantiating McCrea's charge of prejudice and bias on the part of the examining magistrate. Our attention has not been called to any act or conduct on the part of Judge Ferguson, while conducting the preliminary examination, from which prejudice or bias could be inferred" (2099).

And, as we have pointed out, petitioners failed to include in the record any portion of the transcript of testimony taken during the preliminary examination.

V

Further Questions

We observed in our statements concerning the matters involved and the basis of jurisdiction, three other questions raised in No. 738–No. 742 (the Wilcox petition), but these are so frivolous that they require no further discussion. We rest our case on what we have said in Parts II and III of this brief.

VI

Conclusion

We respectfully submit that this case is not one which justifies the granting of a writ of certiorari.

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